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**VIA ECFS**

Marlene H. Dortch
Secretary
Federal Communications Commission
Washington, DC 20554

**Re: CMRS/CLEC Reciprocal Compensation**
**CC Docket No. 01-92, Ex Parte**

Dear Secretary Dortch:

In this letter, Globalcom, Inc.; Mpower Communications Corp.; and U.S. Telepacific Corp. d/b/a Telepacific Communications request that the Commission promptly clarify the *T-Mobile Declaratory Ruling* to provide, or otherwise determine, that CLECs, as well as ILECs, may require CMRS providers to enter into negotiations for reciprocal compensation agreements. Alternatively, the Commission should provide that CLECs may impose termination charges on wireless carriers by state tariff.

In the *T-Mobile Declaratory Ruling*, the Commission sought to end disputes between carriers "as to whether and how reciprocal compensation payment obligations arise in the absence of an agreement or other arrangement between the originating and terminating carriers."[1] The Commission observed that the "practice of exchanging traffic in the absence of an interconnection agreement or other compensation arrangement has led to numerous disputes between LECs and CMRS providers as to the applicable intercarrier regime."[2] The Commission found that in light of these disputes it was "necessary to clarify the type of arrangements necessary to trigger payment obligations ..." for reciprocal compensation.[3] The Commission found that previously "incumbent

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[1] *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, CC Docket No. 01-92, 20 FCC Rcd 4855, FCC 05-42, at paras. 4, 9 (rel. Feb. 24, 2005) ("*T-Mobile Declaratory Ruling*").

[2] *Id.* at para. 6.

[3] *Id.* at para. 9.

LECs were not prohibited from filing state termination tariffs and CMRS providers were obligated to accept the terms of applicable state tariffs. Going forward, however, we amend our rules to make clear our preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff."[4] The Commission further provided that ILECs may require CMRS providers to negotiate arrangements for reciprocal compensation subject to arbitration under Section 252 of the Act.[5]

It is clear from reading the T-Mobile decision in its entirety that the Commission did not intend to treat CLECS and ILECS differently for the purposes of reciprocal compensation arrangement with CMRS providers. Prohibiting CLECs from employing tariffs to establish termination charges for wireless calls while precluding them from requiring CMRS providers to enter into reciprocal compensation agreements subject to arbitration would be very harmful to CLECs and inconsistent with the Commission's stated goal in issuing the *T-Mobile* decision. In the *T-Mobile Declaratory Ruling,* the Commission recognized that "LECs may have had difficulty obtaining compensation from CMRS providers because LECs may not require CMRS providers to negotiate interconnection agreements or submit to arbitration under Section 252 of the Act."[6] The Commission also noted that "CMRS providers may lack incentives to engage in negotiations to establish reciprocal compensation arrangements ..." because CMRS providers are generally net payers of reciprocal compensation and, therefore, prefer bill-and-keep.[7]

These considerations apply to CLECs, as the Commission apparently intended by referring to LECs. In fact, subsequent to the *T-Mobile Declaratory Ruling,* CMRS providers are now arguing that they can refuse to enter into any reciprocal compensation arrangements with Globalcom and numerous other CLECs. CLECs are experiencing tens of millions of dollars of uncompensated costs because they terminate far more traffic from CMRS providers than *vice versa*. This is extremely harmful and disruptive to reasonable commercial relations for exchange of local traffic between carriers, and is again inconsistent with the Commission's stated goals. If the Commission's apparently erroneous statement that only ILECs may compel negotiations is permitted to stand, ILECs will experience a substantial competitive advantage by receiving tens of millions

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[4] *Id.* at para 9.

[5] *Id.* at para. 16. Pending completion of negotiations, interim transport and pricing of Section 51.715 of the Commission's rules apply.

[6] *Id.* at para. 15 (emphasis added)

[7] *Id.* at para 15 and n.62.

of dollars nationwide in reciprocal compensation payments from CMRS providers. The Commission has a goal of "competitive neutrality" in reform of intercarrier compensation.[8] Until the Commission corrects or clarifies the *T-Mobile Declaratory Ruling*, that decision egregiously violates that goal by providing an excuse to CMRS providers to decline to enter into interconnection agreements with CLECs.

Given the Commission's stated objective in the *T-Mobile Declaratory Ruling* to end disputes between LECs and CMRS providers, there should be no question that the Commission also should end disputes between CLECs and CMRS providers by clarifying or revising that decision as requested by the undersigned CLECs. Significantly, there is no explanation in the order as to why, on the one hand, the going-forward prohibition on filing tariffs applies to LECs, whereas the clarification concerning the application of past tariffs and the ability to compel negotiations with CMRS providers applied to ILECs. As it stands, since there is no discussion, explanation or stated policy reason as to why the Commission would issue a ruling that is not competitively neutral and treat CLECs differently than ILECs, this appears to be a completely arbitrary and capricious result. Most likely, the Commission simply made an inadvertent error in referring at some points to LECs and at others to ILECs.

The Commission has ample authority to establish the result requested. In the *T-Mobile Declaratory Ruling*, the Commission relied on Sections 201 and 332 in adopting its requirement with respect to ILECs. The Commission may rely on the same authority to impose the requirements requested here. To the extent necessary, the Commission may undertake the role of arbitrator should CLEC and CMRS reciprocal compensation negotiations fail. Nor is the Commission barred from addressing CLEC/CMRS reciprocal compensation in this proceeding. The *InterCarrier Compensation NPRM* in this proceeding provides the Commission ample coverage to adopt as a Second Report and Order either interim or permanent intercarrier compensation rules with respect to CLEC/CMRS reciprocal compensation.

Moreover, the requested relief is within the scope of pending petitions for reconsideration of the *T-Mobile Declaratory Ruling*. MetroPCS contends that it asks the Commission for a limited reconsideration, *i.e.* that the Commission determine that CLECs were prohibited from using wireless termination tariffs.[9] However, it is a logical and necessary outgrowth of consideration of this issue that the Commission also consider application of other integrally related aspects of its reciprocal compensation policy to CLECs. The Commission cannot be expected to resolve a narrow feature of its reciprocal

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[8] *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 05-33, para. 33 (rel. Mar. 3, 2005).

[9] MetroPCS Petition for Reconsideration at para 2.

compensation policy, particularly one that could be very harmful to CLECs, without addressing the other issues that would be necessarily raised by a determination by the Commission concerning past use of CLEC wireless termination tariffs. MetroPCS raised the issue of whether CLECs could have lawfully imposed wireless termination tariffs and having done so, the Commission may address that issue as well as the obvious ensuing issues of whether CLECs may use such tariffs prospectively and, in light of any resolution of that that issue, whether CLECs, like ILECs, may compel CMRS providers to enter into negotiations for reciprocal compensation agreements.

In fact, MetroPCS' petition explicitly recognizes that the Commission may not consider in isolation only the allegedly narrow issue of the validity of past CLEC wireless termination tariffs. MetroPCS notes the inconsistency of the Commission's finding that ILEC prior wireless termination tariffs could be given effect while prohibiting all LECs from filing such tariffs prospectively, and claims that if the prospective prohibition is invalid so is the finding concerning prior filed tariffs.[10] MetroPCS views the past and prospective application of wireless termination tariffs as integrally linked. Therefore, its petition raises the issue of the validity and application of the prospective use of wireless termination tariffs by LECs and the Commission may clarify or amend that determination in response to the MetroPCS petition. MetroPCS's petition raises with respect to CLECs the same package of linked issues addressed in the *T-Mobile Declaratory Ruling* with respect to ILEC/CMRS reciprocal compensation, including past and future use of wireless termination tariffs and the ability going-forward to compel CMRS providers to enter into reciprocal compensation negotiations. Accordingly, the relief requested is within the scope of the MetroPCS petition for reconsideration. It would be unlawful for the Commission to deny the requested relief based on the artificially truncated scope that MetroPCS would like to give its petition.

In *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003), the Court recognized a distinction between rulemaking and clarification of an existing rule. The Court noted that "whereas a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements [citations omitted], new rules that work substantive changes in prior regulations are subject to the APA's procedures." [11] MetroPCS filed a petition asking the Commission to clarify or reconsider its determinations with respect to CLECs. [12] Therefore, *Sprint Corp. v. FCC* does not bar the requested relief because MetroPCS has asked the Commission to reconsider the applicability of its determination in the *T-Mobile Declaratory Ruling* with respect to CLECs. Notice of the MetroPCS

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[10] MetroPCS petition at n.16.

[11] 315 F.3d at 374.

[12] MetroPCS Petition, at n. 9.

petition was printed in the Federal Register and the Commission may change or clarify all of the issues raised by the petition without a further NPRM.



The Commission should reject each and every one of MetroPCS's contentions. MetroPCS claims that the Commission's previous concern about CLEC terminating access charges justifies prohibiting CLECs from using wireless termination tariffs.[13] However, those concerns dealt with access charges which are non-reciprocal payments by IXCs to LECs for originating or terminating calls. The present case concerns reciprocal compensation by carriers for terminating each other's local calls. If CLECs are considered to have a monopoly in terminating calls to their customers, the same holds true for CMRS providers and their customers. Thus, CLECs have no choice but to use CMRS termination services to reach a CMRS end user even though CMRS providers refuse to enter into reciprocal compensation agreements and even though traffic is heavily out of balance in CMRS providers' favor. Accordingly, MetroPCS's access charge analogy is invalid. In fact, it is CMRS providers that are abusing their monopoly access to end users because they terminate far more calls to CLECs than *vice versa*, and, therefore, have no incentive to negotiate reciprocal compensation arrangements with CLECs.

It would be unlawful for the Commission to grant MetroPCS's request that bill-and-keep be established as the default rule for reciprocal compensation between CMRS providers and CLECs without providing some mechanism for the parties to negotiate a different method. The current rule for non-ISP bound traffic is that bill-and-keep may not be unilaterally imposed by one party where traffic is unbalanced.[14] The *T-Mobile Declaratory Ruling* implicitly rejected bill-and-keep as a default by establishing the Commission's preference for negotiations for reciprocal compensation. It would be unlawful and discriminatory for the Commission to allow CMRS providers to unilaterally impose bill-and-keep for the same traffic terminated by CLECs for which the Commission required carriers to negotiate reciprocal compensation agreements when terminated by ILECs.

MetroPCS's seeks to justify the *status quo* by the claim that CMRS and CLECs enjoy a parity in bargaining power in that neither can compel the other to negotiate. This is no more than a ruse to permit CMRS providers to refuse to negotiate notwithstanding

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[13] *Id.* at 7 (citing *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 960262, 16 FCC Rcd 9923, para. 8 (2001)).

[14] 47 C.F.R. § 51.713(b); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, at para. 1111 (1966) ("*Local Competition Order*").

the balance of traffic in their favor. Prior to the *T-Mobile Declaratory Ruling*, ILECs were not able to compel CMRS providers to negotiate but could rely on their tariffs to fill the gap created by the lack of a duty on the part of the CMRS providers to negotiate. However, now under *T-Mobile,* CLECs are hamstrung and figuratively have their hands tied because they cannot compel negotiations nor can they rely on their tariffs when CMRS providers refuse to negotiate.[15] For the same reasons that the Commission modified its rules with respect to ILECs, it should now clarify that the same rules apply with respect to CLECs. Applying such determinations to CLEC/CMRS reciprocal compensation would create an appropriate balance in negotiating power, especially since removing the opportunity for CLECs to impose wireless termination tariffs without replacing that process with a duty to negotiate, necessarily creates an imbalance in negotiating power in a situation where the traffic is not in balance. Alternatively, affirming that CLECs may use such tariffs on a past and going-forward basis would create a more equitable balance of bargaining power than the *status quo*. This would motivate CMRS providers to negotiate an agreement, which would then supersede the tariff.

For these reasons, the Commission in this proceeding should promptly clarify the *T-Mobile Declaratory Ruling* to provide, or otherwise determine, that CLECs, as well as ILECs, may require CMRS providers to enter into negotiations for reciprocal compensation agreements. Alternatively, the Commission should affirm that CLECs may impose termination charges on wireless carriers by state tariff.

Sincerely,

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[15] MetroPCS is also incorrect that the 1996 Act did not alter the regulatory status with respect to CMRS and CLEC obligations to negotiate. MetroPCS Petition at para. 15. That Act for the first time established a statutory obligation for all carriers to interconnect either directly or indirectly. *See* 47 U.S.C. Section 251(a).

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